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IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1975

No. 75-123

HORACE E. and EDITH B. NICHOLS,
Petitioners,

vs.

COMMISSIONER OF INTERNAL REVENUE,
Respondent.

PETITION FOR A WRIT OF CERTIORARI

To the United States Court of Appeals for the Fifth Circuit

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COMMISSIONER OF INTERNAL REVENUE,
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PETITION FOR A WRIT OF CERTIORARI

To the United States Court of Appeals for the Fifth Circuit

The petitioners Horace E. and Edith B. Nichols respectfully pray that a writ of certiorari issue to review the judgment and opinion of the United States Court of Appeals for the Fifth Circuit entered in this proceeding on April 18, 1975. A petition for rehearing was denied on June 11, 1975.

OPINIONS BELOW

The opinion of the Court of Appeals, reported at 511 F.2d 618 (5th Cir. 1975), is attached hereto as Appendix I.

The opinion of the United States Tax Court dated May 21, 1973, reported at 60 TC 236 (1973), is attached hereto as Appendix II.

JURISDICTION

The judgment of the Court of Appeals for the Fifth Circuit was entered April 18, 1975. Petition for rehearing was denied June 11, 1975. This petition for certiorari was filed within 90 days of that date. Jurisdiction to issue the writ is invoked, pursuant to the provisions of Title 28 § 1254(1), United States Code.

This case involves the construction of Title 26 § 162, Title 26 § 164 and Title 26 § 212 of the United States Code.

QUESTIONS PRESENTED

1. Whether the majority opinion of the Court of Appeals has misapplied the decision of the Supreme Court in *McDonald v. Commissioner*, 323 U.S. 57 (1944).

2. Whether the majority opinion of the Court of Appeals has overlooked or misapprehended the real public policy as concerns our income tax law as exemplified by the decision of the Supreme Court in *C.I.R. v. Tellier*, 383 U.S. 687 (1966).

3. Whether the majority opinion of the Court of Appeals has overlooked the fact that if public policy forbids any deduction

for income tax purposes of expenditures by a judge to continue in office then such public policy would preclude any such expenditures from being deductible whether expressly deductible as a tax or otherwise.

4. Whether the majority opinion of the Court of Appeals has overlooked the fact that there can be no "campaign expense" when there is no campaign, and the tax paid by petitioners was therefore deductible either under § 162, § 164 or § 212 of the Internal Revenue Code of 1954.

5. Whether the majority opinion of the Court of Appeals results in invidious discrimination and a denial of equal application of the tax laws to the holders of public office because of the refusal to recognize and apply the decision of the United States Tax Court in *Cremona v. C.I.R.*, 58 TC 219 (1972), which decision has been acquiesced in by the Commissioner of Internal Revenue.

STATUTES AND REGULATIONS INVOLVED

The following statutes and regulations are set forth in the Appendix as Appendix III:

26 United States Code § 162

26 United States Code § 164

26 United States Code § 212

Revenue Ruling 75-120

STATEMENT OF THE CASE

On November 15, 1966 petitioner, Horace E. Nichols, was appointed to the office of Associate Justice of the Supreme Court of Georgia. Petitioner's wife, Edith B. Nichols, is a

party to this litigation only because she filed a joint income tax return with petitioner, Horace E. Nichols, for the year 1968.

During the month of May, 1968, petitioner qualified under the laws of the State of Georgia to run in the statewide Democratic primary election for the unexpired term—November 6, 1968 through December 31, 1968—of the office of Associate Justice of the Supreme Court to which he had been appointed and for a full term of six years beginning January 1, 1969. Petitioner was *unopposed* in the primary election held in the fall of 1968 and was nominated as the Democratic candidate for that office in the general election held on November 5, 1968. He was elected for both the unexpired term and the full term beginning on January 1, 1969 at the general election *without opposition.*

Under the rules and regulations governing the Democratic primary elections for 1968 in Georgia, entrance fees for candidates for the office of Associate Justice of the Supreme Court of Georgia was set at $1,800 which petitioner paid during the month of May, 1968.

The qualifying fees of all candidates seeking nomination in the 1968 Democratic primary were used solely for the purpose of holding primary elections and no part of such funds was used for political purposes.

The petitioner claimed the $1,800 as a deduction on his 1968 Federal Income Tax Return, which deduction was disallowed by the Internal Revenue Commissioner. Thereafter, the present action was filed in the United States Tax Court. The decision of that court, *Nichols v. Commissioner*, 60 TC 236 (1973), was adverse to the petitioner *by a divided court.* On appeal the United States Court of Appeals for the Fifth Circuit decided the issue adverse to the petitioner (*Nichols v. Commissioner of Internal Revenue*, 511 F.2d 618 (1975)), again *by a divided court.*

REASONS FOR GRANTING THE WRIT

I. The writ of certiorari should be granted in this case because both the Tax Court of the United States and the United States Court of Appeals for the Fifth Circuit *by divided courts* have construed the language in the opinion of this court in *McDonald v. Commissioner*, 323 U.S. 57 (1944) so as to preclude the deduction of necessary expenses to continue in office by the holders of public office, which expenses under no stretch of the imagination could come within the ambit of the decision in such case.

The opinion of the Supreme Court in *McDonald* dealt solely with campaign expenses, to wit: the expenditure of money in support of a particular candidate or a party ticket in a contested election. The expenditure by the petitioner in the present case was by a judge to remain in office where there was no campaign inasmuch as such judge was unopposed in both the primary and general elections. The funds derived by such *tax* were expended by state action solely to defray the cost of holding elections.

Webster defined "campaign" as "a series of operations or efforts designed to influence the public to support a particular political candidate, ticket, or measure." *Webster's Third New International Dictionary, Unabridged*, G & C Merriam Company, 1967.

II. In prior litigation between the same parties, *Nichols v. United States*, 223 F. Supp. 709 (1963), the United States District Court for the Northern District of Georgia, quoting from *Sanders v. Gray*, 203 F. Supp. 158 (1962) held: "[T]he conduct of a Primary election in Georgia is such an essential part in the total election process, its conduct and management is so closely supervised by State law, and the effect to be given it is so closely determined by statute that the action of the party in the conduct of its primary constitutes *state action*." It was then held that the filing fee paid by petitioner for a prior year was deductible as a

tax for income tax purposes. Thus, a distinction was drawn between a tax paid to remain in office (where the incumbent had no opposition) and the campaign expenses dealt with by the Supreme Court in *McDonald v. Commissioner*, supra. In two later cases, *Campbell v. Davenport*, 362 F.2d 624 (5th Cir. 1966) and *Maness v. United States*, 367 F.2d 357 (5th Cir. 1966), the United States Circuit Court of Appeals for the Fifth Circuit also recognized that the fee paid by petitioner constituted a tax. This same court in this case holds that the fee paid by the taxpayer in the instant case constitutes a tax, thus recognizing a distinction between such payment and the campaign expenses dealt with in *McDonald v. Commissioner*, supra. The court, however, after recognizing such distinction, refused to apply the same test to determine the deductibility of such tax for income tax purposes as is applied to other taxpayers. This application of a different test to determine deductions for income tax purposes results in invidious discrimination to a small but identifiable group of taxpayers, to wit: those taxpayers who from time to time must pay a "tax" in order to remain in public office although their candidacy is unopposed.

III. In 1966 the Supreme Court of the United States in *Commissioner of Internal Revenue v. Tellier*, 383 U.S. 687 (1966), dealt with the public policy as concerns our income tax law. Mr. Justice Stewart quoted from the Senate debate in 1913 when our first modern income tax act was being considered. Part of the debate presented by the Senator in charge of the Bill was: "[T]he object of this Bill is to tax a man's net income, that is to say, what he has left at the end of the year after deducting from his receipts his expenditures or losses . . ." In dealing with the question there presented, Mr. Justice Stewart said: "We start with the proposition that the federal income tax is a tax on net income . . ." and ". . . Deductions of expenses falling within the general definition of § 162 (a) may, to be sure, be disallowed by specific legislation, since deductions 'are a matter of grace and Congress can, of course, disallow them

as it chooses'. *Commissioner v. Sullivan*, 356 U.S. at 28, 48 S.Ct. at 514 . . . But where Congress has been wholly silent, it is only in extremely limited circumstances that the Court has countenanced exceptions to the general principles reflected in the Sullivan, Lilly[1] and Heininger[2] decisions." The last sentence of the opinion in *Tellier* was: "We decline to distort the income tax laws to serve a purpose for which they are neither intended nor designed by Congress."

Public policy, under the rationale of *McDonald*, precludes deductions for campaign expenses; it does not preclude deductions for legitimate expenses in seeking to produce income when no campaign is involved. See *Primuth v. Commissioner*, 54 TC 374 (1970), where an employment agency fee was allowed where the taxpayer obtained employment; and *Cremona v. Commissioner*, 58 TC 219 (1972), where the taxpayer was permitted to deduct such fees although he did not obtain future employment. See also *Seed v. Commissioner*, 52 TC 880 (1969) where deductions were allowed for expenses in unsuccessfully seeking to go into a business.

As has been pointed out in dealing with the *McDonald* opinion, the expenses there were campaign expenses which "went to the general campaign fund in the service of the party's entire ticket"; they were not, as here, a tax paid in order to secure income.

The expenditure by the petitioner is not precluded by public policy from being a deductible expense for income tax purposes.

If, as the majority opinion holds, public policy forbids any deduction for income tax purposes of the expenditures by a judge to continue in office, then public policy would preclude a candidate for reelection from deducting a state or local sales

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[1] *Lilly v. Commissioner*, 343 U.S. 90 (1952).

[2] *Commissioner v. Heininger*, 320 U.S. 467 (1943).

tax paid for campaign material or state gasoline tax paid on gasoline used during such a campaign, although such taxes are made deductible by 26 U.S.C. § 164 without regard to the use of such gasoline or of the materials on which sales tax was paid. Under the decision of the court below, these taxes would be deductible even though part of campaign expenses in a contested election.

IV. The income earned by the holder of a public elected office is taxable on the same basis as the income earned by employees in the private sector. It is now well settled that expenses incurred in seeking to obtain employment in the same line of business by those in the private sector are deductible. See Revenue Ruling 75-120 attached as part of Appendix III. The synopsis of this revenue ruling, as published by the Internal Revenue Service, provides: "Expenses that can be determined by all objective facts and circumstances to have been incurred by an individual in seeking new employment in the employee's continuing trade or business are deductible under § 162 of the Code even though new employment was not obtained. . ."

Is there any rational distinction between a corporate executive seeking future employment with a new employer and an elected judge seeking to remain in office in the future?

Is not it invidious discrimination, after taxing the income of an elected official on the same basis as that of persons in the private sector to preclude deductions to an elected official which would be granted readily to a person in the private sector? No contention is made that "campaign expenses" should be deductible. It is contended that the tax required to be paid to remain in office is not a campaign expense and the deduction of such tax for income tax purposes should be permitted.

CONCLUSION

The majority opinion of the Court of Appeals extends the opinion of this court in *McDonald v. Commissioner of Internal Revenue*, supra, to extremes never intended by such opinion and thus precludes deductions for income tax purposes to elected public officeholders which are readily permitted to persons in private employment. The opinion results in invidious discrimination as to this small but identifiable group of taxpayers.

The Supreme Court of the United States has never spoken on the subject of deductions for income tax purposes by elected public officials who must pay a tax in order to remain in office but who are not opposed for reelection and thus do not have campaign expenses.

Respectfully submitted

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APPENDIX

APPENDIX

APPENDIX I

Horace E. and Edith B. Nichols,
Petitioners-Appellants,

v.

Commissioner of Internal
Revenue, Respondent-Appellee.

No. 73-3159.

United States Court of Appeals
Fifth Circuit.

April 18, 1975.

State Supreme Court Justice was required to pay $1,800 qualification fee to state political party in order to have his name placed on primary ballot as a candidate. The Commissioner disallowed the deduction of this fee on Justice's 1968 federal income tax return. The Tax Court, 60 T.C. 236, held that fee was not deductible, and taxpayer appealed. The Court of Appeals held that fee which was paid by state Supreme Court Justice to state political party in order to have his name placed on primary ballot as a candidate and which was used to defray costs of primary elections without any part of it being used to promote causes of party candidates was not deductible for income tax purposes as an ordinary and necessary expense incurred either in the carrying on of a trade or business or in the production of income.

Affirmed.

Morgan, Circuit Judge, did not participate.

Clark, Circuit Judge, filed a dissenting opinion in which Bell, Coleman, Roney and Gee, Circuit Judges, joined.

Internal Revenue Key 541

Fee which was paid by state Supreme Court Justice to state political party in order to have his name placed on primary ballot as a candidate and which was used to defray costs of primary elections without any part of it being used to promote causes of party candidates was not deductible for income tax purposes as an ordinary and necessary expense incurred either in the carrying on of a trade or business or in the production of income. 26 U.S.C.A. (I.R.C.1954) §§ 162, 164, 212.

Appeal from a Decision of the Tax Court of the United States (Georgia Case).

Before Brown, Chief Judge, and Wisdom, Gewin, Bell, Thornberry, Coleman, Goldberg, Ainsworth, Godbold, Dyer, Simpson, Morgan,* Clark, Roney and Gee, Circuit Judges.

Per Curiam:

The taxpayer, Horace E. Nichols, is now Chief Justice of the Georgia Supreme Court. On this appeal he argues that the Tax Court erroneously determined that the fee he paid to have his name placed on the ballot in the 1968 Georgia Democratic Primary was not deductible under either section 162, 212 or 164 of the Internal Revenue Code of 1954.[1] We affirm.

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* Judge Morgan did not participate in the consideration or decision of this case.

[1] 26 U.S.C. § 162 provides in relevant part:

"There shall be allowed as a deduction all the ordinary and necessary expenses paid or incurred during the taxable year in carrying on any trade or business."

Section 212 provides:

"In the case of an individual, there shall be allowed as a deduction all the ordinary and necessary expenses paid or incurred during the taxable year—

(1) for the production or collection of income;

The facts as stipulated and relevant to this appeal are as follows. The taxpayer was appointed effective November 16, 1966 to fill an existing vacancy on the Georgia Supreme Court until the next general election on November 5, 1968. In May 1968 he qualified under Georgia law to run in the Democratic Primary Election for the unexpired portion of the regular term (November 6, 1968 through December 31, 1968) and for a succeeding term beginning January 1, 1969. In order to have his name placed on the primary ballot as a candidate, the taxpayer was required to pay an 1,800 dollar qualification fee to the Georgia Democratic Party. Although its amount was set by the party's executive committee, 75% of this assessment was used to defray the cost of the 1968 primary, and the remaining 25% was subsequently used to finance a 1970 primary run-off. No part of the fee was used to espouse the causes of party candidates in the general election. The taxpayer was unopposed in the primary and the general election and was elected both to fill the remainder of the unexpired term and to serve for the next succeeding term. On his 1968 federal income tax return, he subtracted the

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(2) for the management, conservation, or maintenance of property held for the production of income; or

(3) in connection with the determination, collection, or refund of any tax."

Section 164 provides in relevant part:

"(a) General rule.—Except as otherwise provided in this section, the following taxes shall be allowed as a deduction for the taxable year within which paid or accrued:

(1) State and Local, and foreign, real property taxes.

(2) State and local personal property taxes.

(3) State and local, and foreign income, war profits, and excess profits taxes.

(4) State and local general sales taxes.

(5) State and local taxes on the sale of gasoline, diesel fuel, and other motor fuels. In addition, there shall be allowed as a deduction State and local, and foreign, taxes not described in the preceding sentence which are paid or accrued within the taxable year in carrying on a trade or business or an activity described in section 212 (relating to expenses for production of income)."

amount of the primary qualification fee as an adjustment to income, but deduction of this sum was disallowed by the Commissioner. The propriety of this disallowance is the sole appellate issue.

The alpha and the omega of our consideration of the deductibility of this qualification fee is McDonald v. Commissioner, 323 U.S. 57, 65 S.Ct. 96, 89 L.Ed. 68 (1944). The taxpayer in McDonald was appointed to serve an unexpired term as judge of the Court of Common Pleas of Lucerne County, Pennsylvania, his continuance in office for a full term being dependent upon success in his party's primary and the next general election. To obtain the support of his party organization, Judge McDonald had to pay an "assessment" to the party's executive committee. The proceeds of these assessments "went to the general campaign fund in the service of the party's entire ticket." The Commissioner disallowed Judge McDonald's deduction of this assessment and of the expenses he incurred in a losing campaign seeking election. The Supreme Court held that deduction of both amounts was improper under then existing sections substantially equivalent to present sections 162 and 212. Since "his [McDonald's] campaign contributions were not expenses incurred in being a judge but in trying to be a judge for the next ten years," they were not expenses incurred in "carrying on a trade or business" under section 162's predecessor. Describing the antecedent of section 212, the Court stated "[it] merely enlarged the category of income with reference to which expenses were deductible [and] did not enlarge the range of allowable deductions of 'business' expenses."[2] Therefore, "[t]hey [the campaign expenses] were not incurred in 'carrying on' his 'business' of judging." The Court went on to indicate that sound policy reasons supported the limitation of tax deductibility to items clearly authorized by Congress because they constituted so integral a

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[2] *See also* United States v. Gilmore, 372 U.S. 39, 83 S.Ct. 623, 9 L.Ed.2d 570 (1963).

part of the political process.[3] As *McDonald* observes, allowing the deduction of campaign expenses involves such potentially subtle ramifications on the entire political process that express legislative rather than interpretive judicial consideration is necessary.[4]

Our decision in Campbell v. Davenport, 362 F.2d 624 (5th Cir. 1966), is dispositive of all issues here. In *Campbell* the taxpayer sought to deduct a primary qualification fee, the proceeds of which were used by his party's executive committee to defray the costs of holding the primary. We held that such an expenditure was deductible as a tax under section 164 as it existed prior to amendment. Before doing so, the argument that this fee was deductible under either sections 162 or 212 was rejected in the following terms:

> "[T]hough the assessment in the present case differs in some ways from that in *McDonald* the rationale of *McDonald* prevents the reaching of a different result here. Judge Davenport's assessment was incurred as an expense of attaining the office, not in performing the judicial function. For this reason, the deduction of the assessment as an ordinary and necessary expense incurred in carrying on a trade or business or in the production of income was properly denied by the Commissioner."

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[3] The Court stated:

> "The relation between money and politics generally—and more particularly the cost of campaigns and contributions by prospective officeholders, especially judges—involves issues of far-reaching importance to a democracy and is beset with legislative difficulties that even judges can appreciate. But these difficulties can neither be met nor avoided by spurious interpretation of tax provisions dealing with allowable deductions."

323 U.S. at 63, 65 S.Ct. at 98, 89 L.Ed. at 70.

[4] The Tax Court in Carey v. Commissioner, 56 T.C. 477, 480 (1971), recently discussed some of these policy considerations in denying a deduction of campaign expenses to an unsuccessful candidate for reelection as president of a union.

While *Campbell* confirms that the fee paid by the taxpayer in the instant case constitutes a tax,[5] the post *Campbell* amendment of section 164 causes it to have the effect of denying deductibility. This is so because section 164 now limits the tax which Judge Nichols can deduct to those covered by sections 162 and 212. Thus *Campbell's* interpretation of these latter sections, both confirms tax status and denies deductibility. We

Affirm.

Clark, Circuit Judge, with whom Bell, Coleman, Roney and Gee, Circuit Judges, join, dissenting:

The filing fee paid by Justice Nichols was not paid into a political party general campaign fund. Rather, it was used to defray the necessary cost of conducting the party primary. Justice Nichols was not opposed in the primary or in the general election; therefore, merely entering the primary was tantamount to election. He had to pay the fee to continue in the only job he had. In no pragmatic sense could it be said that he incurred the expense in "trying to be a judge." Whether the fee is viewed as a tax or as an ordinary and necessary expense, to be deductible, it must be incurred in carrying on a trade or business under section 162 or an activity described under section 212. Justice Nichols paid the fee because it was an absolute business necessity to the continued production of his livelihood.

The Supreme Court in *McDonald*, and this court in *Campbell*, foreclosed deductibility in a conscious effort to stay out of the political thicket. I cannot dispute the wisdom of such reasoning. However, business deductions which can be as easily segregated from political considerations, such as this fee exacted from Justice Nichols for the right to retain his job, pose

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[5] *See also* Nichols v. United States, 223 F.Supp. 709 (N.D.Ga. 1963); and Maness v. United States, 367 F.2d 357 (5th Cir. 1966).

no danger to the public policy consideration underlying the decision in *McDonald*.

While *Campbell* is not distinguishable on its facts from the case at bar, *McDonald* is. Judge McDonald not only paid a substantially larger fee than Justice Nichols, Judge McDonald's fee went into a political party "war chest" to defray all manner of campaign expenses. Judge McDonald was opposed and, in fact, lost the election. His contribution was necessary to obtain party support and to influence voters. He was trying to win an election to be a judge in the future. In *McDonald* the Court also dealt with a deduction for "campaign expenses". In the case at bar, there were no related campaign expenses because there was no campaign.

At the conclusion of the opinion in *McDonald*, the Supreme Court clearly indicated that it was depending on the Tax Court to apply the principle it there announced to the "quagmire of particularities" involved in a "detailed analysis of the special circumstances of various 'businesses' and expenses incident to their 'carrying on'." The Tax Court has exercised this function and allowed deductions in situations analogous to the case at bar, notably in the area of employment agency fees.

Fees paid to employment agencies have been held to be deductible on the basis that the expenditures were incurred by the taxpayer in carrying on his trade or business. The expense is deemed ordinary and necessary to improving the taxpayer's position in his trade or business albeit under a different employer. See Primuth v. Commissioner, 54 T.C. 374 (1970); Kenfield v. Commissioner, 54 T.C. 1197 (1970); Cremona v. Commissioner, 58 T.C. 219 (1972). In *Primuth* the Tax Court determined that Primuth was in the trade or business of being a corporate executive. The court also refused to condition deductibility on whether the fee was contingent on obtaining employment or not. The Tax Court allowed the deduction in

Kenfield even though the taxpayer did not accept the job offer which resulted from the employment agency's efforts. In *Cremona* the fee was deductible despite the lack of success in finding employment for the taxpayer. There is no valid reason for allowing the deduction for the fees paid by these taxpayers as a prerequisite for obtaining a better position and disallowing the deduction for the fee paid by Justice Nichols as a prerequisite for continuing in his job.

It would not be inconsistent with *McDonald*, for the court en banc to depart from that portion of its decision in *Campbell* which denies deductibility to the fee paid by one situated as Justice Nichols. *Campbell* unnecessarily restricts *McDonald* and precludes the exercise of the discretion that holding granted to the Tax Court to analyze specific deductions claimed to constitute proper business expenses.

Horace E. and Edith B. Nichols, Petitioners-Appellants,

v.

Commissioner of Internal Revenue, Respondent-Appellee,

No. 73-3159

United States Court of Appeals, Fifth Circuit

June 11, 1975

Appeal from a Decision of the Tax Court of the United States (Georgia Case); 60 T.C. 236.

On Petition for Rehearing

(Opinion April 18, 1975, 5 Cir. 1975, 511 F.2d 618)

Before Brown, Chief Judge, and Wisdom, Gewin, Bell, Thornberry, Coleman, Goldberg, Ainsworth, Godbold, Dyer, Simpson, Morgan*, Clark, Roney and Gee, Circuit Judges.

Per Curiam:

It is ordered that the petition for rehearing filed in the above entitled and numbered cause be and the same is hereby denied.

Bell, Coleman, Clark and Gee, Circuit Judges, would grant the petition for rehearing for the reasons stated in Judge Clark's dissent to the opinion of the court en banc.

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* Judge Morgan did not participate in the consideration or decision of this case.

APPENDIX II

60 T. C. No. 28

United States Tax Court

Horace E. and Edith B. Nichols, Petitioners

v.

Commissioner of Internal Revenue, Respondent

Docket No. 2202-71 Filed May 21, 1973

Petitioner, after filling an interim vacancy on the Supreme Court of Georgia, was successfully elected to a full term as an Associate Justice on the Supreme Court of Georgia. In order to qualify as a candidate for this position in the 1968 Georgia primary election, petitioner was assessed an $1,800 filing fee by the Democratic Party of Georgia.

Held: The filing fee is not deductible as a state tax under sec. 164, nor is it otherwise deductible under sec. 162 or sec. 212, I.R.C. 1954.

Horace E. Nichols, pro se.

Edward P. Phillips, for the respondent.

Opinion

Tannenwald, *Judge*: Respondent determined a deficiency in petitioners' Federal income tax for the taxable year 1968 in the amount of $610.44. The sole issue is whether a filing fee paid by petitioner Horace E. Nichols to the Democratic Party of

Georgia in order to have his name placed on the State of Georgia's election ballot is a tax that qualifies for deduction for Federal income tax purposes under section 164[1] or is otherwise deductible under either section 162 or 212.

All of the facts have been stipulated. The stipulation of facts and the exhibits attached thereto are incorporated herein by this reference.

Petitioners resided in Rome, Georgia, at the time they filed their petition herein. They filed a joint Federal income tax return for the taxable year 1968 with the district director of internal revenue at Atlanta, Georgia. Petitioner Edith B. Nichols is a party herein only by reason of having filed such joint return. Horace E. Nichols will hereinafter be referred to as petitioner.

Petitioner was appointed to the office of Associate Justice of the Supreme Court of Georgia on November 15, 1966, to fill a then existing vacancy. The appointment was effective until the next general election on November 5, 1968.

During the month of May 1968, petitioner qualified under the laws of the State of Georgia to run in the statewide Democratic primary election for the unexpired portion of his then current term, i.e., November 6, 1968 through December 31, 1968, and for an ensuing six-year term commencing on January 1, 1969.

Petitioner was unopposed in the May 1968 primary election and was accordingly nominated by the Democratic Party of Georgia as its candidate in the November 1968 general election. Petitioner was also unopposed and consequently elected in that general election.

Under the rules and regulations governing the Democratic Party of Georgia's 1968 primary election, petitioner was as-

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[1] All section references are to the Internal Revenue Code of 1954.

sessed an $1,800 filing fee in order to qualify as a candidate in the primary. Seventy-five percent of petitioner's filing fee was used to cover the cost of the Democratic Party of Georgia's 1968 primary election; the remaining 25 percent was used to finance the cost of that party's 1970 primary run-off. Petitioner deducted the $1,800 filing fee on his 1968 return, which respondent disallowed.

We are again confronted with the question of the extent to which campaign expenditures constitute an allowable deduction for income tax purposes under the principles laid down in *McDonald v. Commissioner*, 323 U.S. 57 (1944). We recently faced this question, in terms of the applicability of sections 162 and 212, and disallowed the deduction in *James B. Carey*, 56 T.C. 477 (1971), affirmed per curiam 460 F.2d 1259 (C.A. 4, 1972). In this case, there is the further complicating factor that petitioner claims that the filing fee in question is deductible as a state tax under section 164 even if the deduction is not available under section 162 or section 212.

Prior to 1964, state taxes were generally deductible and, had the provisions of section 164 remained unchanged, we might have been constrained to conclude that petitioner should prevail on the ground that the filing fee constituted a state tax. *Nichols v. United States*, 223 F.Supp. 709 (N.D. Ga. 1963), vacating a prior decision against the petitioner on other grounds (201 F.Supp. 337 (involving the filing fee of this petitioner for a lower county judgeship in a pre-1964 year)); cf. *Campbell v. Davenport*, 362 F.2d 624 (C.A. 5, 1966); *Maness v. United States*, 237 F.Supp. 918 (M.D. Fla. 1965), affirmed on another issue, 367 F.2d 357 (C.A. 5, 1966); see *Jack E. Golsen*, 54 T.C. 742, 756-758 (1970), affirmed on another issue, 445 F.2d 985 (C.A. 10, 1971). However, even assuming arguendo that the Georgia filing fee should properly be considered a state tax, we are now faced with a different

question because the Revenue Act of 1964 substantially modified section 164. As applicable to the taxable year involved herein, this section reads as follows:

> **Sec. 164. Taxes.**
>
> (a) General Rule.—Except as otherwise provided in this section, the following taxes shall be allowed as a deduction for the taxable year within which paid or accrued:
>
> (1) State and local, and foreign, real property taxes.
>
> (2) State and local personal property taxes.
>
> (3) State and local, and foreign, income, war profits, and excess profits taxes.
>
> (4) State and local general sales taxes.
>
> (5) State and local taxes on the sale of gasoline, diesel fuel, and other motor fuels.
>
> In addition, there shall be allowed as a deduction State and local, and foreign, taxes not described in the preceding sentence which are paid or accrued within the taxable year in carrying on a trade or business or an activity described in section 212 (relating to expenses for production of income).

Clearly, the filing fee paid by petitioner during the taxable year in question is not encompassed within the provisions of section 164(a)(1) through (5). Consequently, if it is deductible as a tax, it must meet the requirements of the catch-all clause, which allows a deduction for other state taxes "which are paid or accrued within the taxable year *in carrying on a trade or business or an activity described in section 212* (relating to expenses for production of income)." (Emphasis added.) Thus, our path takes us back to sections 162 and 212.

We think that, under the rationale of *McDonald v. Commissioner, supra,* petitioner has failed to meet the statutory conditions. In that case, the Supreme Court denied a deduction to a judicial candidate for the amounts paid as a filing fee and as campaign expenses on the ground that such amounts were, not expenses incurred in being a judge but in trying to be a judge." See 323 U.S. at 60. As a consequence, the deduction was denied under both section 23(a)(1)(A) and section 23(a)(2) of the Internal Revenue Code of 1939 (the respective predecessors of sections 162 and 212).

We had occasion in *James B. Carey, supra,* to analyze in some detail the impact of the *McDonald* decision and we see no need to repeat that analysis here. It is sufficient to note those critical factors which underpin our conclusion that *McDonald* is controlling herein.

First, it is important to understand that the Supreme Court in *McDonald* focused on the phrase "carrying on any trade or business" and not on the phrase "ordinary and necessary." Such being the case, we view our task of construction as having the same frame of reference, free of any possible implication that, at least where a tax is concerned, the "ordinary and necessary" requirement of section 162 may not have to be met.[2]

Second, we recognize, as we did in *Carey,* that we have refused to extend the rationale of *McDonald* to deny the deduction of employment agency fees. *Leonard F. Cremona,* 58 T.C. 219 (1972), on appeal (C.A. 3, Dec. 27, 1972); *David J. Primuth,* 54 T.C. 374 (1970). But, as we pointed out in *Carey,* there is a sufficient disparity between employment agency fees

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[2] The legislative history indicates that the catch-all language of section 164 was designed to permit deduction of taxes "even though otherwise they might have to be capitalized." See H. Rept. No. 749, 88th Cong., 1st Sess., p. 50 (1963); S. Rept. No. 830, 88th Cong., 2nd Sess., p. 55 (1964).

and campaign expenditures to justify the conclusion that the former should be dealt with under a different rubric.

Third, we are not impressed with petitioner's contention that filing fees, unlike general campaign expenses, are not variable and discretionary so that an allowance of a deduction for such fees would not tend to favor the wealthy by providing an inducement to persons of means to run for public office—a result which might be considered as contravening public policy or as constituting an unconstitutional discrimination. Cf. *Bullock v. Carter*, 405 U.S. 134 (1972). Moreover, it is an indisputable fact that a filing fee as well as campaign expenses was involved in *McDonald* and neither the opinion of Mr. Justice Frankfurter nor that of Mr. Justice Black drew any distinction between the two.

Finally, we think a word about public policy is in order. There would appear to be an element of contradiction in the view that the allowance of the deduction of a filing fee otherwise properly required as a condition for running for public office would be against public policy. But that is not the frame of the public policy consideration involved in this case. Rather the question we have before us is whether this Court should allow, in the absence of an explicit legislative mandate, the deduction of expenditures that are an inextricable part of the election process—one of the most sensitive elements in the fabric of the democratic way of life. We think that the considerations involved in such a question and the fact that the Supreme Court has spoken in an almost identical situation demand that we stay our hand.

The long and the short of our position is that this case fits the mold of *McDonald v. Commissioner, supra,* and we hold that it controls so as to disallow the deduction under section 162 and section 212, and consequently under the catch-all clause of section 164 as well. We are reinforced in our conclusion by

Campbell v. Davenport, supra, which, in the course of holding that a deduction for a Texas filing fee was not allowable under sections 162 or 212[3] but was deductible as a state tax under the then existing section 164, clearly implied that if the question of the filing fee in that case had arisen under the amendment to section 164 by the Revenue Act of 1964, the deduction as a state tax would also have been disallowed. See *Jack E. Golsen, supra.* See also *Nichols v. United States,* 201 F. Supp. 337 (N.D. Ga. 1962) (which denied the petitioner herein the right to deduct under either section 162 or 212 the filing fee for a lower court judgeship in a pre-1964 year).

Reviewed by the Court.

Decision will be entered for the respondent.

FAY, J., Dissenting: I respectfully submit that *McDonald v. Commissioner,* 323 U.S. 57 (1944), does not compel the result reached by the majority. In *McDonald* the Supreme Court held that campaign expenses incurred by a state court judge, who was serving as an interim appointee, in seeking election for a full term were not deductible under the predecessor of section 162 (i.e., section 23(a)(1), I.R.C. 1939), on the ground that they were not sustained in the business of "*being* a judge but in *trying to be* a judge." [Emphasis added] See *McDonald v. Commissioner, supra* at 60. The Supreme Court further observed that the predecessor of section 212 (i.e., section 23(a)(2), I.R.C. 1939) was also not applicable.

In justifying its conclusion in *McDonald* the Supreme Court emphasized that there were strong public policy considerations for not allowing a deduction for campaign expenses incurred in

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[3] *Maness v. United States,* 367 F.2d 357 (C.A. 5, 1966) reaches the same conclusion.

running for public office and, therefore, that the sanctioning of such a deduction is more appropriately the prerogative of Congress rather than the judiciary.

The expenditures in *McDonald* and the instant case initially seem to be indistinguishable since the expenditures in both cases were incurred in the effort to attain public office. However, after closer examination of *McDonald*, I am convinced that the public policy considerations which operated to preclude allowance of the deduction in *McDonald* are not present in the case at bar. I agree that the judiciary should not intercede to permit a deduction for Federal income tax purposes of such a variable, discretionary item as campaign expenses incurred in running for public office. The authorization of such a policy theoretically could act as an inducement for wealthy people to offer themselves for public office. Accordingly, authorization of such a policy is appropriately the responsibility of Congress and not that of the judiciary. See *McDonald v. Commissioner, supra* at 63.

Nevertheless, the amount of petitioner's filing fee was not subject to his individual discretion. Each contestant for office in the Georgia Democratic Party primary was required to pay an assessed fee to finance the estimated cost of conducting the primary election. Each contestant for the same office was assessed the same fee. Thus, since each contestant for the same office would be entitled to the same deductible amount, I believe that the public policy rationale underlying *McDonald* does not encompass items such as the instant filing fee.[1] Accordingly,

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[1] I recognize that the record does not clarify whether each participant in the primary was assessed a uniform, pro rata fee, or whether the amount of the fee was contingent upon the significance of the specific office within the state political structure. Since the issue of whether the filing fee was based on a sliding scale method is not specifically before us in the instant case, I will not consider its impact at this time.

I am convinced that the allowance of the deduction of the instant filing fee would not frustrate sharply defined public policy. See *Commissioner v. Tellier*, 383 U.S. 687, 694 (1966); and Judge Simpson's dissent in *James B. Carey*, 56 T.C. 477, 485-86 (1971), affd. per curiam 460 F.2d 1259 (C.A. 4, 1972), certiorari denied 409 U.S. 990 (1972).

As I read *McDonald*, the deductibility of the instant filing fee under section 212 is precluded only if the public policy considerations inherent in *McDonald* are also applicable in the instant case.[2] Accordingly, since I have concluded that the public policy considerations of *McDonald* are not applicable in the instant case, and since petitioner's filing fee was expended in an effort to attain an income-producing activity, I would permit the deduction of this item under section 212.

This conclusion is supported by this Court's decisions in *James B. Carey, supra; David J. Primuth*, 54 T.C. 374 (1970); and *Leonard F. Cremona*, 58 T.C. 219 (1972). In *Carey* this Court observed that

> in light of the additional fact that the actual majority in *McDonald* was obtained by a simple concurrence in result by Mr. Justice Rutledge, it is questionable whether the legal theory espoused in the opinion of the Court [i.e., the Supreme Court of the United States] has as wide an application as respondent would have us believe. Indeed, the Court itself indicated that the broad brush stroke of its opinion might be more apparent than real, when it stated that it would leave to this Court the "detailed analysis of the special circumstances of various 'businesses' and expenses inci-

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[2] In *McDonald v. Commissioner*, 323 U.S. 57 (1944), the Supreme Court expressly stated that running for the office of a state court judge did not constitute the trade or business of being a judge. See *McDonald, supra* at 59-60. Therefore, since petitioner was also running for election as a judge and since this activity does not constitute a trade or business, petitioner's filing fee is not deductible under sec. 162.

> dent to their 'carrying on' " and the consequent determination of the "allowed or disallowed deductions." See 323 U.S. at 65. *It seems to us that the Court clearly left room for different results in different factual situations.* Compare *Caruso v. United States*, 236 F.Supp. 88 (D.N.J. 1964) [Emphasis added] [*James B. Carey, supra* at 480]

I believe that the case at bar involves one of those different factual situations which justifies a result different from that in *McDonald*.

In *Primuth* and *Cremona* this Court concluded that employment agency fees were deductible under section 162 where the taxpayer is either successful (*Primuth*) or unsuccessful (*Cremona*) in his efforts to obtain a new position of a type similar to his present one. The public policy considerations that were applicable in *McDonald* and *Carey* did *not* preclude the deduction under section 162 in either *Primuth* or *Cremona*. Analogously, I believe that these same public policy consideration are not applicable in the case at bar and thus should not preclude the deduction of petitioner's filing fee under section 212.[3]

STERRETT, J., agrees with this dissent.

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[3] Since I have concluded that petitioner's filing fee is deductible under sec. 212, I do not find it necessary to consider petitioner's alternative argument that the filing fee is deductible as a state tax under sec. 164.

APPENDIX III

26 United States Code § 162 provides in part:

"(a) In General.—There shall be allowed as a deduction all the ordinary and necessary expenses paid or incurred during the taxable year in carrying on any trade or business . . ."

26 United States Code § 164 provides in part:

"(a) General Rule.—Except as otherwise provided in this section, the following taxes shall be allowed as a deduction for the taxable year within which paid or accrued:

(1) State and local, and foreign, real property taxes.

(2) State and local, personal property taxes.

(3) State and local, and foreign, income, war profits, and excess profits taxes.

(4) State and local general sales taxes.

(5) State and local taxes on the sale of gasoline, diesel fuel, and other motor fuels.

In addition, there shall be allowed a deduction State and local, and foreign, taxes not described in the preceding sentence which are paid or accrued within the taxable year in carrying on a trade or business or an activity described in section 212 (relating to expenses for production of income)".

26 United States Code § 212 provides in part:

"In the case of an individual, there shall be allowed as a deduction all the ordinary and necessary expenses paid or incurred during the taxable year—

(1) for the production or collection of income."

Section 162.—Trade or Business Expenses

26 CFR 1.162-1: Business expenses.

(Also Sections 212, 262, 7805; 1.212-1, 1.262-1, 301.7805-1.)

Expense of seeking new employment. Expenses that can be determined by all objective facts and circumstances to have been incurred by an individual in seeking new employment in the employee's continuing trade or business are deductible under section 162 of the Code even though new employment was not obtained; Rev. Ruls. 60-223, 70-396, and 71-308 revoked.

The Internal Revenue Service has reconsidered its position whether amounts paid by an employee in seeking new employment are deductible under section 162 or 212 of the Internal Revenue Code of 1954.

Section 162 of the Code provides for the deduction of all ordinary and necessary expenses paid or incurred during the taxable year in carrying on any trade or business. In this regard an expense is deductible only if paid or incurred with respect to a trade or business in which the taxpayer is then engaged. *Morton Frank*, 20 T.C. 511 (1953).

Section 212(1) of the Code allows an individual to deduct all the ordinary and necessary expenses paid or incurred during the taxable year for the production or collection of income. Section 212(1) applies to expenses incurred in existing profit-seeking endeavors other than those that qualify as a trade or business. See *Trust of Bingham v. Commissioner*, 325 U.S. 365 (1945), 1945 C.B. 103, and *Morton Frank*.

Section 1.212-1(f) of the Income Tax Regulations states, in part, that expenses incurred in seeking employment or in placing oneself in a position to begin rendering services for compensation are not deductible.

Section 262 of the Code states, in part, that no deductions shall be allowed for personal expenses.

Rev. Rul. 71-308, 1971-2 C.B. 161, holds that fees paid by the taxpayer to a psychological study organization that helped secure him a job are deductible under section 162 of the Code.

Rev. Rul. 70-396, 1970-2 C.B. 68, holds that expenses incurred in making a trip in search of employment are personal and are not deductible.

Rev. Rul. 60-223, 1960-1 C.B. 57, holds that fees paid to employment agencies for securing employment are deductible.

Thus, the longstanding position of the Service has been that expenses incurred by employees in seeking and actually securing new employment are deductible as ordinary and necessary business expenses, but that expenses incurred in seeking but not securing new employment are not deductible.

This distinction between expenses for unsuccessfully and successfully seeking new employment has been rejected by the United States Tax Court.

See, for example, *Leonard F. Cremona*, 58 T.C. 219 (1972), *acq.*, page 6, this Bulletin and *David J. Primuth*, 54 T.C. 374 (1970). The *Primuth* opinion concluded that an employee is engaged in the trade or business of performing services as an employee separate and apart from the performance of those services for his existing employer. The court held in *Cremona* that expenses incurred in seeking new employment in the employee's present trade or business are deductible under section 162 of the Code even though new employment was not secured.

In *McDonald v. Commissioner*, 323 U.S. 57 (1944), 1944 C.B. 94, the Supreme Court of the United States held that the campaign expenses of a judge seeking election to the same po-

sition that he was filling on an interim basis were not deductible as ordinary and necessary expenses. The court stated that the disallowance of campaign expenses has been consistently reflected by legislative history, court decision, Treasury practice, and Treasury regulations. See section 162(e)(2)(A) of the Code and section 1.162-20(c)(1) of the regulations which disallow the deduction of political campaign expenditures. *McDonald* is therefore distinguishable from *Cremona* and *Primuth*.

In view of the above, it is now the position of the Service that expenses incurred in seeking new employment in the same trade or business are deductible under section 162 of the Code if directly connected with such trade or business as determined by all the objective facts and circumstances.

However, such expenses are not deductible if an individual is seeking employment in a new trade or business even if employment is secured. If the individual is presently unemployed, his trade or business would consist of the services previously performed for his past employer if no substantial lack of continuity occurred between the time of the past employment and the seeking of the new employment. Such expenses are not deductible by an individual where there is a substantial lack of continuity between the time of his past employment and the seeking of the new employment, or by an individual seeking employment for the first time. Such expenses are not deductible under section 212(1) of the Code which applies only to expenses incurred with respect to an existing profit-seeking endeavor not qualifying as a trade or business.

If a taxpayer travels to a destination and while at such destination seeks new employment in his present trade or business and also engages in personal activities, traveling expenses to and from such destination are deductible only if the trip is related primarily to seeking such new employment. The amount of time during the period of the trip that is spent on personal activity compared to the amount of time spent on seeking such

new employment is important in determining whether the trip is primarily personal. Section 1.162-2(b) of the regulations. See *Patterson v. Thomas*, 289 F. 2d 108 (5th Cir. 1961).

Expenses while at the destination that are properly allocable to seeking new employment in the taxpayer's present trade or business are deductible even though the traveling expenses to and from the destination are not deductible. Section 1.162-2 (b)(1) of the regulations.

Rev. Rul. 71-308, Rev. Rul. 60-223, and Rev. Rul. 70-396 are hereby revoked. Under authority provided by section 7805 (b) of the Code, this Revenue Ruling will not be applied to fees paid to secure employment in the case of situations similar to those in Rev. Rul. 71-308 and Rev. Rul. 60-223 before April 21, 1975.